Supreme Court, U. S.
FILED
FEB 21 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-602

DONALD W. AGINS AND BONNIE G. AGINS,
Appellants,

v.

CITY OF TIBURON,
Appellee.

On Appeal From the Supreme Court of California

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

National Association of Manufacturers
of the United States of America
1776 F Street, N.W.
Washington, D.C. 20006

FRANK SCHNIDMAN
1919 Pennsylvania Avenue, N.W.
Suite 300
Washington, D.C. 20006
(202) 296-7250

Counsel for Amicus Curiae

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *Amicus Curiae* 1

ARGUMENT 3

I. THE COURT'S DECISION IN THIS CASE WILL HAVE A SUBSTANTIAL IMPACT BEYOND TIBURON. THE DECISION WILL AFFECT THE RIGHT TO USE PRIVATE PROPERTY NATIONWIDE 3

II. THE GROWTH AND COMPLEXITY OF REGULATION AND THE USE OF DISCRETIONARY REVIEW PROCEDURES REQUIRE A FACTUAL INQUIRY INTO THE IMPACT OF REGULATORY ACTIVITY. THIS IS REQUIRED BECAUSE REGULATION WHICH MAY ON ITS FACE APPEAR TO REASONABLY REGULATE, IN EFFECT MAY DENY ALL REASONABLE USE WHEN APPLIED TO THE SPECIFIC PROPERTY AT ISSUE 8

III. THE STATE CITIZENSHIP OF A PRIVATE PROPERTY OWNER SHOULD NOT AFFECT HIS FEDERAL CONSTITUTIONALLY PROTECTED PROPERTY RIGHTS 17

CONCLUSION 21

CASES: Page

Agins v. City of Tiburon, No. 79-602 (U.S., Jurisdictional Statement filed Oct. 1979). 17

Avco Community Developers, Inc. v. South Coast Regional Commission, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976). 9

Berenson v. Town of New Castle, 67 App. Div. 2d 506, 415 N.Y.S.2d 669 (1979). 14-15

Brecciaroli v. Commissioner of Environmental Protection, 168 Conn. 349, 362 A.2d 948 (1975). 10

Camara v. Municipal Court of San Francisco, 387 U.S. 523 (1967). 20-21

Context Development Co. v. Dade County, 374 So. 2d 1143 (Fla. Dist. Ct. App. 1979). 5

Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976). 7

Haas & Co. v. City of San Francisco, 805 F.2d 1117 (9th Cir. 1979). 23

Kurzius, Inc. v. Incorporated Village of Upper Brookville, 67 App. Div. 2d 70, 414 N.Y.S.2d 573 (1979). 13-14

Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979). 21

Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). 21

Lynch v. Household Finance Corp., 405 U.S. 538 (1972). 21

Nectow v. City of Cambridge, 277 U.S. 183 (1928). ... 17

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978). 5, 16-17, 18

Pennsylvania Coal Co. v. Mahon, 260 U.S. 412 (1922). 4, 6, 15, 16, 18, 21, 22

Prince George's County v. Blumberg, —— Md. ——, 407 A.2d 1151 (1979). 3, 15

Pruneyard Shopping Center v. Robins, No. 79-289 (U.S., Jurisdictional Statement filed Aug. 1979). 20

Page

Roseta v. County of Washington, 250 Or. 161, 458 P.2d 405 (1969). 24-25

Sanfilippo v. County of Santa Cruz, 415 F. Supp. 1340 (N.D. Cal. 1976). 25-26

Spears v. Berle, 48 N.Y.2d 254, 422 N.Y.S.2d 636 (1979). 11

Vickers v. Township Committee of Gloucester Township, 37 N.J. 232, 181 A.2d 129 (1962). 24

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). 8

MISCELLANEOUS:

S. ABRAMS, HOW TO WIN THE ZONING GAME (1978). ... 11

AMERICAN BAR ASSOCIATION ADVISORY COMMISSION ON HOUSING AND URBAN GROWTH, HOUSING FOR ALL UNDER LAW: NEW DIRECTIONS IN HOUSING. LAND USE AND PLANNING LAW (R. Fishman ed. 1978). .. 16

Babcock, *U.S. to Check Bias in Local Zoning*, The Washington Post, Jan. 18, 1980, at A2, col. 3. 24

R. BABCOCK, THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES (1966). 8, 9, 24

Letter from Anthony C. Beilenson (D-Cal.) to Calvin S. Hamilton, Director, Los Angeles City Planning Commission (May 30, 1979). 5-6

Delaney & Kominers, *He Who Rests Less, Vests Best: Acquisition of Vested Rights in Land Development*, 23 ST. LOUIS U.L.J. 219 (1979). 9

B. FRIEDEN, THE ENVIRONMENTAL PROTECTION HUSTLE (1979). 11, 24

J. GARDINER & T. LYMAN, DECISIONS FOR SALE: CORRUPTION AND REFORM IN LAND-USE AND BUILDING REGULATION (1978). 24

D. GODSCHALK, ET AL., CONSTITUTIONAL ISSUES OF GROWTH MANAGEMENT (1979). 16

Page

Nahas & Eskind, *Developing in a Hostile Environment*, URBAN LAND, Nov. 1978, at 7. 11

NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY, H.R. Doc. No. 91-34, 91st Cong., 1st Sess. (1968). 4

Nelson, Comment, *A Private Property Right Theory of Zoning*, 11 THE URBAN LAWYER 713 (1979). 9, 22-23

Schnidman, *The "Taking" Issue: Reality or Myth?*, URBAN LAND, March 1979, at 14. 21

URBAN LAND INSTITUTE, ULI RESEARCH REPORT #29, THIRTEEN PERSPECTIVES ON REGULATORY SIMPLIFICATION (A Kolis ed. 1979). 10

N. WILLIAMS, AMERICAN LAND PLANNING LAW: LAND USE AND THE POLICE POWER (5 vols., 1974). 5, 11, 12, 13, 17, 18-19, 20, 21

28 U.S.C. § 1343(3) (1976). 21

42 U.S.C. § 1983 (1976). 21

Or. SB 100 (ch. 80, 1973 Or. Laws). 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-602

DONALD W. AGINS AND BONNIE G. AGINS,
Appellants,

v.

CITY OF TIBURON,
Appellee.

On Appeal From the Supreme Court of California

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

INTEREST OF *AMICUS CURIAE*

With consent of the parties, the National Association of Manufacturers of the United States of America respectfully submits this brief as *amicus curiae* in support of the Appellants.

The National Association of Manufacturers (NAM) is incorporated under the laws of the State of New York as a non-profit voluntary business association

The NAM represents approximately 12,000 members engaged in manufacturing and related businesses, whose employees comprise an estimated 78% of the nation's manufacturing work force. NAM members are engaged in substantial natural resource activities in a variety of areas. These areas include timber, coal, oil and gas, hard rock minerals, water resource development, agriculture, and land development and building. Members are located in all 50 states, in urban, suburban and rural areas.

This case presents to the Court the question of whether it is constitutionally permissible for a state court, without factual inquiry, to hold unqualifiedly that payment of just compensation for the taking of private property for a public use, provided for by the Fifth and Fourteenth Amendments, is never available as a remedy to a property owner who complains of a taking accomplished by means of regulation, effectively depriving him of his property. Further, the question is also before this Court of whether, if such taking could be proved, the only remedy available is judicial invalidation. NAM members are regulated in most aspects of their business operation, and especially face a myriad of regulation when deciding to make use of their property. The past decade has witnessed a "regulatory explosion," and while no single set of regulations may deprive a private property owner of the use of his property, when taken together, regulatory activity may effectively prohibit such use. It is generally accepted that reasonable restrictions may prohibit proposed use of property when the use will present a clear and present danger to public health and safety. A problem arises, however, when regulatory activity is undertaken to preserve the status quo, the "quality of

life," the parochial interests of local citizens—when special interests masquerade as the public interest.

This case not only addresses the remedy issue in urban and suburban settings, it also concerns the remedy for alleged deprivation of private property rights in rural areas, and presents this Court with the issue of whether a landowner is entitled to his day in court with the opportunity to prove that regulations, which on their face appear to be valid, may in fact be invalid when applied to his property. If such an opportunity is not presented, government may "run amok,"[1] with potentially substantial adverse impacts on local, regional or the national economy.

Due to the NAM's diverse membership base, we believe our filing a brief as *amicus curiae* offers a broad view of the significant issues raised in this appeal. NAM members have a huge stake in stewardship of land and rely heavily on the resources it provides. The case before this Court produces the potential for enormous mischief in relation to those interests. Realizing this, NAM submits this brief in support of Appellants.

ARGUMENT

I. The Court's Decision In This Case Will Have A Substantial Impact Beyond Tiburon. The Decision Will Affect The Right To Use Private Property Nationwide.

State and federal courts have increasingly deferred to the presumption of legislative validity given local governments in their land use and environmental regulatory activities. This is particularly true of zoning in urban areas where land is allocated for specific, limited

---

[1] Prince George's County v. Blumberg, —— Md. ——, 407 A.2d 1151, 1155 (1979).

uses—such as residential, commercial, or industrial use. The courts have upheld restrictions which appear to achieve a "public purpose" and the exercise of the police power seems "reasonable," and only recently have the courts begun to question the intent and effect of such actions. Despite the controversy and criticism over the effectiveness of zoning and other land use controls in urban areas,[2] certain state legislation now requires regulation in rural areas as well.[3] The potential for deprivation of property rights and misallocation of resources is enormous. What may be approved as a decrease of density in an urban setting from one unit per acre to one unit per five acres, may be used in a rural setting to justify preventing an owner of forest land from economically using four-fifths of his property. Under a range of public welfare considerations, private rural property may be regulated on the basis of urban-oriented decisions, resulting in increased litigation and adverse impact upon local, regional or even the national economy.

As this Court stated in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 412, 414 (1922):

> To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it.

---

[2] *See* NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY, H.R. Doc. No. 91-34, 91st Cong., 1st Sess. 199 (1968).

[3] For example, in 1973, the Oregon legislature enacted SB 100 (ch. 80, 1973 Or. Laws), which provided for statewide land use planning. This legislation created a Land Conservation and Development Commission (Or. Rev. Stat. § 197.030) which was responsible for the promulgation of planning goals which all cities and counties in the state must observe.

This applies to other extractable natural resources as well.

One of the more threatening aspects of the continued lack of restriction on the extent of police power regulation is that despite certain judicial inroads to "sophisticated judicial review"[4] of such actions, most courts still defer to the legislative determination that the regulatory activity is "in the public interest." As public health and safety regulatory activity is augmented by legislation to protect the public welfare, the "quality of life"—amenities and luxuries rather than necessities—serious questions arise as to how much private landowners should be burdened for a general public benefit. Again, while it may be appropriate to tell the owner of a railroad terminal that his continued use of the terminal as such is a reasonable use,[5] it is quite another thing to tell a rural resource landowner that he may not cut timber or extract mineral resources in certain areas in order to prevent harm to what is vaguely asserted as the public welfare.[6] The unreason-

---

[4] N. WILLIAMS, 1 AMERICAN LAND PLANNING LAW: LAND USE AND THE POLICE POWER § 5.05 (1974).

[5] Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).

[6] An example of this is Context Dev. Co. v. Dade County, 374 So. 2d 1143, 1144 (Fla. Dist. Ct. App. 1979), where plaintiff was served with a cease and desist order issued by the Director of the Department of Environmental Resources Management, ordering him to halt "any further 'rock plowing' . . . that could result in altering said land in any way whatsoever." This order was conditioned upon the submission of an environmental impact statement, even though the Director did not have authority under either the statute or county code to require any environmental impact statement from the property owner. *Agins* has already been cited in correspondence from Congressman Anthony C. Beilenson (D-Cal.) to Mr. Calvin S. Hamilton, Director of the Los Angeles

able restriction of such use may actually harm the public welfare, for the public welfare would be benefited by the new jobs created, the products manufactured, the economic growth and corresponding increased tax revenues resulting from the use of the land.

City Planning Commission, as assurance that it is "legally within your power and is not, in fact, subject to inverse condemnation suits" for the Planning Commission to adopt an "interim protection period" policy to prevent development of private property in the Santa Monica Mountains and the adjacent coastline area included within the boundaries of the Santa Monica Mountains National Recreation Area. This "interim" period should last, he stated, "until the Santa Monica Mountains Comprehensive Plan, the Los Angeles County General Plan, and the Malibu/Santa Monica Mountains Area Plan are adopted." This process will take years to complete, and while this is going on, Congressman Beilenson cites *Agins* for the proposition that there is no risk in denying zoning changes, denying minor land subdivision, denying development-oriented permits, opposing extension of public facilities, and tightening regulation of non-permit activity. There are legitimate reasons for a conservation attitude toward the Santa Monica Mountains, but certainly not the comprehensive protectionist approach suggested. "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922) (Brandeis, J., dissenting).

It should be noted that the California Supreme Court in *Agins* justifies the lack of an inverse condemnation cause of action on the basis of public policy. 157 Cal. Rptr. at 372, 376, 377, 379. However, "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone." Pennsylvania Coal Co. v. Mahon, 260 U.S. 412, 413 (1922). *Amicus curiae* argues that *Agins* is such a case, where federal constitutional rights are placed in substantial jeopardy because of a failure of the California Supreme Court to recognize the limits on the implied limitation.

In rural areas, government agencies are applying concepts which were developed for urban areas where the benefits and burdens on landowners are somewhat reciprocal. In urban areas, each owner's use is restricted but the owner benefits in varying degrees from the restrictions on other property owners. For example, the owner of a residential property is protected against having a factory operating nearby, and industry is protected from the adverse impacts of residential encroachment. Also, property owners often benefit from any stability in property values that zoning tends to provide.

Such reciprocity of benefits and burdens is generally lacking in rural situations. A disproportionate burden all too often falls on the rural landowner in relation to any benefit, and he is often outnumbered and vulnerable in the political process which produces land use regulation.[7]

---

[7] Chief Judge Breitel of the New York State Court of Appeals addressed this problem directly:

> The ultimate evil of a deprivation of property, or better, a frustration of property rights, under the guise of an exercise of the police power is that it forces the owner to assume the cost of providing a benefit to the public without recoupment. There is no attempt to share the cost of the benefit among those benefited, that is, society at large. Instead, the accident of ownership determines who shall bear the cost initially. Of course, as further consequence, the ultimate economic cost of providing the benefit is hidden from those who in a democratic society are given the power of deciding whether or not they wish to obtain the benefit despite the ultimate economic cost, however initially distributed (Dunham, Legal and Economic Basis for Planning, 58 Col.L.Rev. 650, 665). In other words, the removal from productive use of private property has an ultimate social cost more easily concealed by imposing the cost on the owner alone. When successfully concealed, the public is not likely to have any objection to the "cost-free" benefit.

Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 596-97, 350 N.E.2d 381, 387, 385 N.Y.S.2d 5, 11 (1976).

It is desirable, therefore, that the Court carefully weigh its words, and recognize the impact of this decision on all land use and land use regulation in the United States.

II. The Growth And Complexity Of Regulation And The Use Of Discretionary Review Procedures Require A Factual Inquiry Into The Impact Of Regulatory Activity. This Is Required Because Regulation Which May On Its Face Appear To Reasonably Regulate, In Effect May Deny All Reasonable Use When Applied To The Specific Property At Issue.

The regulation of land use has substantially evolved since the United States Supreme Court first upheld the concept of zoning in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Zoning began as an extension of common law nuisance regulation, initially to protect the homogeneous, single-family suburb from the city. As land use attorney Richard F. Babcock has stated in his now classic work, THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES (1966):

> The United States Supreme Court in 1926 upheld zoning in the landmark case of *Village of Euclid v. Ambler Realty Co.* because that conservative bench regarded the intrusion of industry and apartments into single-family zones as cousin to a public nuisance, similar to the intrusion of a tuberculosis sanitarium which could be kept out under orthodox common law principles. The Court stated, "A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard," and, after describing the noxious consequences of allowing an apartment house in a single-family zone, it concluded, "Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances."

Id. at 41 (footnote omitted, emphasis omitted).[8] Mr. Babcock then goes on to find that:

> Zoning was no more than a rational and comprehensive extension of public nuisance law, with the great advantage (over the common law nuisance) of providing all landowners with knowledge before the fact of what they could and could not do with their land.

Id.

Traditionally, zoning designated the allowable uses of private property. The fact is, however, that zoning no longer tells the landowner what he can and cannot do with his land.[9] Pressures for environmental protection, growth management, aesthetic regulation, etc., have resulted in increasing regulatory efforts which

[8] The problem of the nuisance approach is that it is easier to state than apply, and that it is difficult to quantify degrees of threat to the public health, safety and welfare.

> The nuisance theory of zoning, however, did not provide an adequate theoretical basis for municipal zoning of undeveloped areas. Under the nuisance theory, an absence of existing uses meant that guidelines for zoning were difficult to adopt. Zoning of undeveloped areas also posed a substantial risk of arbitrary or corrupt administration of zoning by creating sizeable land value gains for favored landowners or builders, while imposing losses on others. There was no assurance under the nuisance theory that municipal administrations of zoning in developing areas would take account of wider regional interests in the location of new housing and other facilities.

Nelson, Comment, *A Private Property Right Theory of Zoning*, 11 THE URBAN LAWYER 713, 715-16 (1979).

[9] Delaney & Kominers, *He Who Rests Less, Vests Best: Acquisition of Vested Rights in Land Development*, 23 ST. LOUIS U.L.J. 219 (1979); and Avco Community Developers, Inc. v. South Coast Regional Comm'n, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), where developer had expended over $2 million in site preparation in reliance upon zoning and other approvals, but was denied a building permit because of a new piece of legislation passed prior to the completion of his grading activity.

condition approval based upon a discretionary review process.[10] In many instances, it can truly be said that the landowner does not know from the face of an ordinance what he can or cannot do with his property.[11]

---

[10] URBAN LAND INSTITUTE, ULI RESEARCH REPORT #29, THIRTEEN PERSPECTIVES ON REGULATORY SIMPLIFICATION (A. Kolis ed. 1979).

[11] An example of this is Brecciaroli v. Commissioner of Environmental Protection, 168 Conn. 349, 362 A.2d 948 (1975), where plaintiff was denied a permit to conduct a regulated activity on land designated as tidal wetland. In holding that the denial of the application to fill 5.3 acres of wetland did not constitute a taking without compensation, the court stated:

> The record before us discloses only that a specific application for a permit to fill 5.3 acres of wetland was denied by the defendant. The denial of that application merely prohibited one specific use which presumptively was not reasonable when balanced against the public harm it would create. The plaintiff may still be permitted on subsequent application to fill a lesser portion of his wetland to be used in conjunction with the 3.1 acres of the parcel not classified as wetland; he may make application for a permit or permits to conduct other regulated activities on the wetland; and he may make any reasonable unregulated use of his land consistent with the laws of the state and the zoning regulations of the town of Guilford. "Until it appears that the plaintiff has been finally deprived . . . of the reasonable and proper use of the property it cannot be said that there has been an unconstitutional taking of property without just compensation."

168 Conn. at 357-58, 362 A.2d at 952 (citation omitted).

The land use approval process requires a substantial investment of time and money, and because of its complexity requires the advice and assistance of a variety of professionals. When the application is completed, the reviewing body can withhold approval of *that* proposal, because of the discretionary nature of the present-day approval process, and ask the applicant to try again—without telling him what they will approve.

The New York State Court of Appeals, in a footnote, recently recognized this problem:

> One difficulty faced under the act by both the landowner and the Commissioner should be identified. Since the statute contains a catalogue of uses permitted as of right, and also allows the Commissioner to issue permits for other uses, the landowner may not initially know the full spectrum of possible uses to which his evidentiary proof must be addressed. The availability of uses not permitted as of right will depend upon the scope of permits which the Commissioner is willing to grant. While the property owner should not, for this reason, be relieved of his heavy burden of proof, he should be afforded a reasonable opportunity to obtain notice of the uses, if any, for which the Commissioner would issue a permit. The manner in which this notice may be provided will vary with the circumstances of each case, and the hearing court should, in the first instance, be free to fashion an acceptable remedy. In some instances, it may be appropriate, for example, to require the Commissioner to come forward prior to the hearing with some indication of the uses which he would permit. In other cases, where the extent of permitted uses becomes evident at the hearing, it may suffice to grant the landowner a continuance, if otherwise warranted, to allow him an opportunity to address his burden of proof.

Spears v. Berle, 48 N.Y.2d 254, 263 n.4, 422 N.Y.S.2d 636, 640 n.4 (1979). This attitude, however, is the minority view.

During the period of increasing regulation and discretionary review, the state courts, as Professor Norman Williams, Jr. describes it in his five-volume treatise AMERICAN LAND PLANNING LAW: LAND USE AND THE POLICE POWER (1974), §§ 5.01-5.06, have evolved from a first stage of generally recognizing government's power to deal with nuisances and to exclude certain objectionable occupations from whole towns or from residential neighborhoods. The second stage was

Additionally, with the increasing trend of legislatively providing standing to anyone to intervene in the approval process, we see where even a lone boy scout working on an eagle scout project can block a major project for a year and a half, agreeing to drop the fight in exchange for an acre of property worth approximately $50,000, plus $10,000 in cash which was put into a fund to finance environmental causes. B. FRIEDEN, THE ENVIRONMENTAL PROTECTION HUSTLE 25-26 (1979). *See also* Nahas & Eskind, *Developing in a Hostile Environment*, URBAN LAND, Nov. 1978, at 7; and S. ABRAMS, HOW TO WIN THE ZONING GAME (1978).

one of acceptance of zoning which allowed broad restrictions on use without compensation and the arrangement of uses into districts. A third stage, which Williams calls "Faith in Local Autonomy," evidences "a genuine presumption of validity which controls unless a strong case is made to the contrary, the rule that zoning is valid when the case is fairly debatable." *Id.* § 5.04.

Professor Williams also identifies a fourth stage, one that is presently evolving, which he entitles "Sophisticated Judicial Review," and which he calls "a wiser, more sceptical, and more realistic view." *Id.* § 5.05. He finds that:

> The third period was thus a major (and necessary) step forward to enable American communities to capture some control over their own destiny; it was a stage through which the law had to pass. However, the shortcomings of this approach have gradually become all too evident, for it ignored some of the most important aspects of the present land use control system—the built-in bias towards both fiscal zoning and exclusionary zoning, and the frequently low level of competence of local government.

Id. § 5.04. The third stage evidences a lack of suspicion about motives or actual effects. The fourth stage, however, "reflects a sadder and a wiser mood:"

> It is recognized that many restrictions on developers' property rights are needed in the modern world, to prevent development which will really harm neighbors or the environment generally. But it is also recognized that local land use restrictions may also serve a non-legitimate purpose, or indeed sometimes no real purpose at all—that is, they may be exclusionary in intent and/or effect, or merely the product of a quite parochial vision, or sometimes unduly harsh with little compensating public benefit—or merely inept.

Id. § 5.05. In fact, when state courts have actually examined motive and intent, they have found instances where neither was permissible, or where although there was a legitimate purpose to the action, the means to achieve it were unacceptable.

The Appellate Division of the New York State Supreme Court recently declared unconstitutional five-acre residential zoning in a wealthy Long Island village in *Kurzius, Inc. v. Incorporated Village of Upper Brookville,* 67 App. Div. 2d 70, 414 N.Y.S.2d 573 (1979). After an examination of the record the court found that:

> The record demonstrates beyond peradventure of doubt that the leaders of the village, after consulting with some of the large landowners, *decided to use their zoning power to preserve the village as a citadel of privilege.* Thus their zoning power was not being used as a proper exercise of the police power to serve the general welfare, but rather to stop the march of progress and to preserve special benefits for the privileged group of large landowners which consists mainly of present residents of the village.

67 App. Div. at 81, 414 N.Y.S.2d at 580 (emphasis added).[12]

---

[12] The Court went on to state in a footnote

> the truism that zoning power, an exercise of the police power to the State, is to be used to protect and preserve the common weal, not the private interest of individual property

This same court, one month later, reviewed the remanded result in a case dealing with the exclusion of multifamily dwellings. *Berenson v. Town of New Castle,* 67 App. Div. 2d 506, 415 N.Y.S.2d 669 (1979). Justice Shapiro, concurring in part and dissenting in part, stated that:

> In a case such as this where the dilatory tactics of the town have prevented the plaintiffs from proceeding with their building project for more

---

owners or even of a local community. If an individual property owner or a group of such owners wish to preserve the sparsely inhabited rural nature of their property they are, of course, free to do so by voluntary association for that purpose. They may not, however, under our system of constitutional government which guarantees equal protection of the laws to all persons, invoke the compulsion of State power by the use of a zoning ordinance to achieve that goal at the expense of other property owners and would-be inhabitants of the community.

67 App. Div. at 82n., 414 N.Y.S.2d at 580n., and followed up in the text of the decision with the following observation:

> We are fully aware of the line of authority which declares that upon parties who attack zoning ordinance rests the burden of showing that the regulation assailed is not justified under the police power of the State or by any reasonable interpretation of the facts. We are also aware that in any area of even moderate density, comprehensive and balanced zoning is essential to the health, safety and welfare of the community and that the task of achieving this goal devolves upon the local legislative body, and that its judgment must be allowed to control if the classification is fairly debatable. However, as we have noted, under the undeniable facts in this case, the plaintiffs have met that burden for it is clear that the ordinance before us was adopted to preserve the present by denying the future. No longer may governmental agencies retain the benefits of, or hereafter adopt, discriminatory, exclusionary or selective zoning ordinances which are designed solely to protect the interests of their more affluent residents by turning a blind eye and a deaf ear to the plight of the less fortunate of their own, or their regions' residents.

67 App. Div. at 82-83, 414 N.Y.S.2d at 581 (citations omitted).

> than five years, two strikes should be out. The conduct of the town fathers exhibits a flagrant and intentional and malicious policy of disregard for the law which was clearly intended to impede, if not entirely defeat, the rights of the plaintiffs. . . . Enough is enough.

67 App. Div. 2d at 518, 415 N.Y.S.2d at 681.

And more recently, the Court of Special Appeals of Maryland reviewed a damage award for the wrongful revocation and failure to reissue building, water and sanitary permits. *Prince George's County v. Blumberg,* —— Md. ——, 407 A.2d 1151 (1979). Based upon an extensive record, for which the printed record extract was nearly 1,500 pages, the court found that "This is a case of government running amok," —— Md. at ——, 407 A.2d at 1155, where the permits were unlawfully revoked in what the court found "beyond doubt" was "bowing to community pressure." —— Md. at ——, 407 A.2d at 1159. Describing the facts as a "Kafkaesque drama," the court affirmed the local government liability for damages. —— Md. at ——, 407 A.2d at 1162.

The cases above are examples of the result of a plaintiff being given his day in court to prove the impact of regulatory activity upon his property. The California Supreme Court, in its opinion below, quotes from this Court in *Pennsylvania Coal Co. v. Mahon,* stating:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power.

157 Cal. Rptr. at 378, *citing Pennsylvania Coal Co. v. Mahon,* 260 U.S. 412, 413 (1922).

The Court, however, in *Pennsylvania Coal Co.* continued:

> But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. *So the question depends upon the particular facts.* The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.

260 U.S. at 413 (emphasis added).

An ordinance on its face allowing a reasonable use of property may still be shown to be invalid as measured against the arbitrary and capricious standard or the Equal Protection Clause of the federal Constitution.[13] Additionally, with the extent of overlapping regulation affecting the basic zoning approval, an examination of the "particular facts" as mentioned in *Pennsylvania Coal* is necessary to determine the validity of the zoning ordinance's impact. Further, remembering this Court's final footnote in its opinion in *Penn Central Transportation Co. v. New York City,* 438 U.S.

[13] The case law in this area concerns itself with exclusionary zoning. *See* D. GODSCHALK, ET AL., CONSTITUTIONAL ISSUES OF GROWTH MANAGEMENT (1979), chapters 3, 6; and AMERICAN BAR ASSOCIATION ADVISORY COMMISSION ON HOUSING AND URBAN GROWTH, HOUSING FOR ALL UNDER LAW: NEW DIRECTIONS IN HOUSING, LAND USE AND PLANNING LAW (R. Fishman ed. 1978), chapter 3.

104, 138 n.36 (1978), Appellants should be provided the opportunity to prove the alleged taking of their private property.[14]

III. The State Citizenship Of A Private Property Owner Should Not Affect His Federal Constitutionally Protected Property Rights.

Supremacy principles should prevent state court decisions from being used to defeat a private property owner's federal Constitutional rights. Appellants' Jurisdictional Statement traces the confusing state of the case law dealing with challenges to allegedly excessive land use regulation.[15] A decision is needed by this Court to provide the requisite guidance necessary to prevent

[14] That footnote stated:

> We emphasize that our holding today is on the present record, which in turn is based on Penn Central's present ability to use the Terminal for its intended purposes and in a gainful fashion. The city conceded at oral argument that if appellants can demonstrate at some point in the future that circumstances have so changed that the Terminal ceases to be "economically viable," appellants may obtain relief.

And as this Court has stated in Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928): "The government power to interfere by zoning regulation with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restrictions cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare."

The principal question Professor Williams finds facing American land use controls today is at the heart of this case—"will judicial review be perceptive and probing, to vindicate basic values, or merely superficial and mechanical?" N. WILLIAMS, 1 AMERICAN LAND PLANNING LAW: LAND USE AND THE POLICE POWER § 5.06 (1974).

[15] Jurisdictional Statement 19-21, Agins v. City of Tiburon, No. 79-602 (U.S., filed Oct. 1979).

the accident of state citizenship from affecting federal Constitutional rights.[16]

It might be considered appropriate to author an opinion on as narrow a legal principle as possible to dispose of the instant case; however, in the spirit of this Court's opinion in *Pennsylvania Coal,* because of the "extensive interests" involved with this case:

> It seems, therefore, to be our duty to go farther in the statement of our opinion, in order that it may be known at once, and that further suits should not be brought in vain.

260 U.S. at 414.

In his review of over 10,000 land use cases, Professor Williams includes in his treatise a section on "Trends in Supreme Court Law, and Their Impact Upon the States." He finds that:

> The principal theme in American planning law for the last thirty years has been the gradual spread among the state courts of the implications of the constitutional revolution of 1937, as promulgated by the United States Supreme Court—or, to put the same point differently, a judicially supervised shift of power away from developers. Speaking very generally, before 1937 public limitations on various kinds of economic activity were generally regarded as dubious and were frequently held invalid by the Supreme Court, while restrictions on various civil liberties tended to be upheld.

[16] The latest statement that this Court, "quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons" will not resolve this problem. Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978).

> Since 1937, the situation has been almost precisely reversed. Public limitations on economic activity have been held invalid only in one or two special situations; in contrast, claims based upon civil liberties have been treated with greater respect and have tended to prevail, although the emphasis has varied at different periods. For the last 20 years, then, the prevailing rule in civil liberties cases has been that there has been more or less an inverse presumption of constitutionality, at least in connection with claims based upon due process. That is to say, activities classified under the "civil liberties" heading occupy a preferred position, and restrictions on such activities can only be justified by a particularly strong showing by the government.
>
> In the years since 1937, this dual attitude has spread slowly through the state courts, with wide variations as between different states. In planning law the first part of the new attitude, giving greater respect to public regulation of economic activity, was generally accepted in most states by the late 1950's; this is the third stage of American zoning, described in § 5.04. As for the second half —the special emphasis on civil liberties—the state courts have been slow to recognize its relevance to the field of land use law; this is finally coming to the fore in the 1970's.

N. WILLIAMS, 1 AMERICAN LAND PLANNING LAW: LAND USE AND THE POLICE POWER § 4.02 (1974) (footnotes omitted).

Professor Williams further finds that this Court has not participated in the development of land use law, and that:

> As a result of this abdication of responsibility by the Supreme Court, the Court—subsequent to its 1937 change of basic attitudes—has had no influ-

> ence in this field whatsoever. This field of law has therefore undergone a basically different experience from most other fields of American public law, for there has been no direct infusion of the basic attitudes of either "the Roosevelt Court" or the "Warren Court"—with their sense of legal realism, respect for social values, and clear articulation of constitutional doctrine. This part of the law has suffered heavily thereby.

Id. § 4.03.

Amicus curiae NAM members have felt the impact of this lack of guidance. Many NAM members do business in more than one state and find themselves subject to differing Constitutional interpretations of the extent to which they can use their private property. Experiences by certain NAM members have left them wondering why it appears that Freedom of Speech and Freedom of the Press are subject to greater protection than private property rights.[17] Some have even wondered why it appears that the due process rights afforded a criminal defendant appear so much greater than those afforded a private property owner attempting to use his property.[18]

---

[17] In fact, this Court has accepted the appeal of Pruneyard Shopping Center v. Robins, No. 79-289 (U.S., Jurisdictional Statement filed Aug. 1979), a case from the California Supreme Court in which the court protected the right of private citizens to exercise their right of free speech and petitioning in a privately owned shopping center. The court there found that this Court's decision in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), does not prevent California's providing greater protection than the First Amendment provides, despite the private property owners' objections.

[18] This Court has examined the rights afforded the lessee of private property when facing criminal prosecution for failure to allow a warrantless inspection by a housing inspector. "It is surely anomalous to say that the individual and his private property

The law in this area has "suffered" [19] long enough. Direction by this Court is needed to provide basic guidance to the states' judiciary in handling challenges to land use regulations.

CONCLUSION

This Court has addressed *amicus curiae's* concern in *Pennsylvania Coal Company v. Mahon*:

> When this seemingly absolute protection [of private property rights] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualifications more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

---

are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." Camara v. Municipal Court of San Francisco, 387 U.S. 523, 530 (1967) (footnote omitted). *Amicus curiae* feels that the same standard should apply to the Fifth Amendment.

Also, this Court, in Lynch v. Household Finance Corp., 405 U.S. 538 (1972), held that there was no distinction between personal liberties and proprietary rights with respect to jurisdiction under 28 U.S.C. § 1343(3), there being no basis to distinguish between personal and property rights. Then in Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979), this Court found a cause of action properly invoked under 42 U.S.C. § 1983 for the alleged violation of Fifth and Fourteenth Amendment rights because of the impact of a land-use ordinance on their private property. These cases provide hope for private property owners who are being forced to seek a federal judicial forum to escape from the holdings of cases such as *Agins*. *See* Schnidman, *The "Taking" Issue: Reality or Myth?*, URBAN LAND, March 1979, at 14. Guidance from this Court will serve to lessen the need for aggrieved private property owners to seek a federal forum for a hearing on alleged violation of their federal Constitutional rights.

[19] N. WILLIAMS, *supra* note 4, at § 4.03.

260 U.S. at 415. In the half century since the decision in *Euclid* it has been left to the state courts to put flesh on the frame of that decision which permitted restrictions on the Constitutionally-protected rights in private property in return for public benefits. Certain state courts, however, have not heeded the admonition of this Court in *Pennsylvania Coal* concerning human nature.

First, *amicus curiae* points out that the decision of this Court will be viewed nationwide as the "latest word" on the ability of government to regulate private property under the rubric of public health, safety and welfare. Private property owners, government officials and citizens' groups will be quick to interpret the decision as it affects their ability to act. Clear guidance is needed from this Court, and *amicus curiae* respectfully asks this Court to consider the effect of its action on all private property owners, not just those seeking residential use of their property in an urban setting.[20]

---

[20] Zoning for urban areas has been recognized as substantially different than zoning for rural areas.

> Under zoning, the owner of undeveloped land surrenders many of his development rights to the municipality. In theory, he is compensated by the fact that public planning will produce a more livable and desirable community environment, one in which property values generally will be higher. In practice, however, this benefit seldom has been realized because of the ineffectiveness of public planning. Instead, the authority to zone undeveloped areas has been widely employed by the majority of municipal residents to satisfy their own purposes, often in conflict with the objectives of minority landowners in undeveloped parts of the municipality. Contrary to planning theory, the administration of zoning has been largely politically determined and has reflected the balance of interests in the municipality at a given time.

Second, *amicus curiae* points out that the state courts, left to expand upon the principles of *Euclid,* have put flesh on the frame of that decision; yet when looking at what has grown from state courts' decisions, widely divergent bodies of law are seen. The attempt to balance an extension of police power regulatory authority over use of land with the rights of the owners of private property has left the case law in utter confusion, and guidance is desperately needed from this Court.

Finally, *amicus curiae* points out that the judicial struggle with new concepts and a variety of techniques has not been without false starts, criticism and confusion. Additionally, the municipal struggle in this area has not been without its problems, political pressures

---

Nelson, *supra* note 8, at 721. An example of this is Haas & Co. v. City of San Francisco, 805 F.2d 1117 (9th Cir. 1979), where the court held a rezoning of a developer's property which resulted in a diminution of value from $2 million to $100,000 to be within the police power of the city.

Yet, as commentators have also recognized,

> Zoning in undeveloped areas raises different issues than it does in existing neighborhoods and a different reform approach therefore is required. The introduction of zoning to undeveloped areas initially raised legitimate questions with regard to whether a taking had occurred in that landowners were forced to surrender valuable property rights without receiving any benefits in compensation. At this time, however, it would be impossible in many cases to remedy past inequities, since the land will frequently have changed hands. Instead, the main motive for reform is greater efficiency in land use to stop the major waste of land caused by zoning restrictions that effectively prevent large areas from being used in their most valuable way, or even from being used at all.

Nelson, *supra* note 8, at 726.

and conflicts.[21] The federal Constitutional issue here is important, and should not be glossed over on the basis of facial examination of a restrictive ordinance. As Justice Hall stated in his dissent in *Vickers v. Township Committee of Gloucester Township*, 37 N.J. 232, 181 A.2d 129 (1962):

> Municipal legislative action is always assumed to have been taken conscientiously, sincerely and honestly. The test of validity is certainly something much more than bad faith or corruption. Local officials, no matter how conscientious and sincere in their own minds, may be legally wrong in formulating into legislation what they think is best for their community. *The only place that question can be tested and individual rights and privileges safeguarded is in the courts.* The judicial branch does not meet its full responsibility when, as here, its concept of review gives unquestioning deference to the views of local officials.

37 N.J. at 261, 181 A.2d at 145 (emphasis added). The courts of Oregon have also been concerned with the all too willing attitude of the judiciary to accept local legislative action as appropriate.

> This broad and vague statement of judicial restraint under the separation of powers doctrine, without further definition, furnishes no helpful guide in drawing the line between action which is

---

[21] R. BABCOCK, THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES (1966); B. FRIEDEN, THE ENVIRONMENTAL PROTECTION HUSTLE (1979); J. GARDINER & T. LYMAN, DECISIONS FOR SALE: CORRUPTION AND REFORM IN LAND-USE AND BUILDING REGULATION (1978); Babcock, *U.S. to Check Bias in Local Zoning*, The Washington Post, Jan. 18, 1980, at A2, col. 3.

> arbitrary and action which is reasonable. It has been observed that the failure of the courts to identify more definitively the standards relevant in judging the legitimate scope of legislative action in zoning has often resulted in an abdication of the function of judicial review in this field.

Roseta v. County of Washington, 254 Or. 161, 164-65, 458 P.2d 405, 407 (1969) (footnote omitted).

The evolution of land use regulation presents a present-day situation where owners of private property, regardless of what the ordinance regulating their property may state, may not be allowed a reasonable use of their property because of increasing concerns for not only protecting the public health and safety, but also in protecting and enhancing the public welfare. Surely, an owner of private property regulated to the extent that he may not be able to make a reasonable use of it should have his day in court to prove such.

Amicus curiae respectfully submits that the decision of the Supreme Court of California is in error in denying Appellants their day in court,[22] and accordingly ask this Court to find in favor of the Appellants.

---

[22] The United States District Court for the Northern District of California would seem to agree with *amicus curiae:*

> Defendants urge the Court to hold that zoning regulations enacted pursuant to a comprehensive plan for community development are proper exercises of the police power and therefore not actionable as a matter of law. In essence, defendants are requesting the Court to apply in the area of land use regulation the "any reasonable basis" test that the United States Supreme Court has applied in evaluating legislative discretion in the areas of economic and social regulation. This

Respectfully submitted,

FRANK SCHNIDMAN
1919 Pennsylvania Avenue, N.W.
Suite 300
Washington, D.C. 20006
(202) 296-7250
Counsel for Amicus Curiae

> Court is unwilling to so hold. The constitutional test in "takings" cases requires an independent judicial analysis of the facts of the case and not merely a finding that the legislative body acted on substantial evidence or was not unreasonable or arbitrary in enacting the ordinance in question. Of course the Court will give considerable weight to the well-considered planning decisions of state and local legislative bodies, but this is only one of several factors to be considered.

Sanfilippo v. County of Santa Cruz, 415 F. Supp. 1340, 1344 (N.D. Cal. 1976) (citation omitted).